

FILED**FEB 08 2023**CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY [Signature]
DEPUTY CLERK**Maurice Rodgers**

NAME

BJ4613

IDENTIFICATION/BOOKING NO.

P.O. Box 290066

ADDRESS OR PLACE OF CONFINEMENT

Represa, Calif. 95671

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his or her name, address, telephone and facsimile numbers, and e-mail address.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

MAURICE DIAUNDR A ROGERS

FULL NAME (Include name under which you were convicted)

Petitioner,

v.

JEFF LYNCHNAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED
PERSON HAVING CUSTODY OF PETITIONER

Respondent.

CASE NUMBER:

2:23 - CV 0238 - KJNHQ

CV

To be supplied by the Clerk of the United States District Court

☐ **AMENDED**

**PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254**

PLACE/COUNTY OF CONVICTION

PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT
(List by case number)

CV

CV

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge judgments entered by more than one California state court, you must file a separate petition for each court.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. You must also state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
6. You must pay a fee of \$5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds \$25.00, you must pay the filing fee.
7. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the ~~Central~~ District of California
United States Courthouse
ATTN: Intake/Docket Section
~~255 East Temple Street, Suite TS-134~~
Los Angeles, California 90012

PLEASE COMPLETE THE FOLLOWING (check appropriate number):

This petition concerns:

1. ☒ a conviction and/or sentence.
2. ☐ prison discipline.
3. ☐ a parole problem.
4. ☐ other.

PETITION

1. Venue

- a. Place of detention California State Prison/Sacramento
- b. Place of conviction and sentence Nevada County, Nevada City; 50 years-to-life

2. Conviction on which the petition is based (a separate petition must be filed for each conviction being attacked).

- a. Nature of offenses involved (include all counts): First Degree Murder; personally used a firearm; personally discharged a firearm; and intentionally discharged a firearm causing death in the commission of the offense
- b. Penal or other code section or sections: Penal Code section 187(a); Penal Code section 1202253.(b), (c) & (d)

- c. Case number: TF-16000201
- d. Date of conviction: FEBRUARY 19, 2019
- e. Date of sentence: MAY 31, 2019
- f. Length of sentence on each count: Count 1: 50 years. enhancement allegations 50 years imposed and then stayed

g. Plea (check one):

- ☒ Not guilty
☐ Guilty
☐ Nolo contendere

h. Kind of trial (check one):

- ☒ Jury
☐ Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? ☒ Yes ☐ No

If so, give the following information for your appeal (and attach a copy of the Court of Appeal decision if available):

- a. Case number: _____
- b. Grounds raised (list each):
 - (1) The evidence was sufficient to warrant an instruction that
 - (2) The judgment should be conditionally reversed and the case

- (3) _____
(4) _____
(5) _____
(6) _____

c. Date of decision: _____
d. Result _____

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? ☒ Yes ☐ No

If so, give the following information (and attach copies of the Petition for Review and the Supreme Court ruling if available):

- a. Case number: _____
b. Grounds raised (list each):
(1) The evidence was sufficient to warrant an instruction that .
(2) The judgement should be conditionally reversed and the case
(3) _____
(4) _____
(5) _____
(6) _____
c. Date of decision: _____
d. Result _____

5. If you did not appeal:

- a. State your reasons _____

b. Did you seek permission to file a late appeal? ☐ Yes ☒ No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?
☐ Yes ☒ No

If so, give the following information for each such petition (use additional pages, if necessary, and attach copies of the petitions and the rulings on the petitions if available):

- a. (1) Name of court: _____
(2) Case number: _____
(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): _____

(5) Date of decision: //////// (6) Result //////// (7) Was an evidentiary hearing held? ☐ Yes ☒ No7. Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know): //////// (2) Result: //////// (3) Date of result (if you know): (4) Citation to the case (if you know): ////////

8. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement:* In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: The evidence was sufficient to warrant an instruction that subjective provocation could raise a reasonable doubt as to the

(1) Supporting FACTS: Reversal of Petitioner's conviction for first degree murder is warranted because there was substantial evidence supporting instruction subjective provocation, which would reduce first degree murder to second degree murder (CALCRIM No. 522 [Provocation: Effect on Degree of Murder]). When defense counsel

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

b. Ground two: The judgment should be conditionally reversed and the case remanded to permit the trial court to consider whether to grant

(1) Supporting FACTS:

SEE PAGE 5-1

Continued from page 2;3(b),Grounds Raised;

(1),subjective provocation could raise a reasonable doubt as to the existence of premeditation and deliberation sufficient to reduce premeditated first degree murder to second degree murder [CALCRIM No. 522],and thus counsel rendered ineffective assistance by failing to request such instruction,warranting reversal of the judgement of first degree murder.

(2),remanded to permit the trial court to consider whether to grant appellant mental health diversion.

Continued from page;4(b),Ground Raised;

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(2),remanded to permit the trial court to consider whether to grant appellant mental health diversion.

(4) Grounds raised (list each):

- (a) ////////
- (b) _____
- (c) ////////
- (d) _____
- (e) ////////
- (f) _____

(5) Date of decision: _____

(6) Result _____

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

b. (1) Name of court: ////////

(2) Case number: _____

(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): _____

(4) Grounds raised (list each):

- (a) ////////
- (b) _____
- (c) ////////
- (d) _____
- (e) _____
- (f) _____

(5) Date of decision: _____

(6) Result ////////

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

c. (1) Name of court: ////////

(2) Case number: _____

(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): _____

(4) Grounds raised (list each):

- (a) ////////
- (b) _____
- (c) ////////
- (d) _____
- (e) _____
- (f) ////////

(5) Date of decision: _____

(6) Result ////////

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

7. Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know): //

(2) Result: _____
 // // // // //

(3) Date of result (if you know):

(4) Citation to the case (if you know): //

8. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

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(1) Supporting FACTS: Reversal of Petitioner's conviction for first degree murder is warranted because there was substantial evidence supporting instruction subjective provocation, which would reduce first degree murder to second degree murder (CALCRIM No. 522 [Provocation: Effect on Degree of Murder]). When defense counsel

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? x x ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes x ☒ No

b. Ground two: The judgment should be conditionally reversed and the case remanded to permit the trial court to consider whether to grant

(1) Supporting FACTS:

REF PAGE 5-3

Continued from page 5;8(a),Ground One;

1 8(a),existence of premeditation and deliberation sufficient to
2 reduce premeditated first degree murder to second degree murder
3 [CALCRIM NO. 522],and thus counsel rendered ineffective assistance
4 by failing to request such an instruction,warranting reversal of
5 the judgement of first degree murder.

6 (1) Supporting Facts; Continued from page 5;

7 lost the argument on the lesser included offense of voluntary/
8 manslaughter (which has both a subjective and objective componebt),
9 trial counsel deficiently failed to cite to the court the substan-
10 tial evidence supporting the subjective component and failed to
11 request CALCRIM NO.522,which unlike voluntary manslaughter only has
12 a subjective component. There was ample evidence of subjective pro-
13 cation,including the romantic but volatile relationship between
14 Petitioner and Felicia Sprell-Jones,their recent eviction from their
15 apartment,and recent accusations and admissions of infidelity in
16 their relationship. A reasonable probability exists of a more favor-
17 able result based on evidence of subjective provocation (i.e. recent
18 admission of infidelity by Jones in the romantic relationship she had
19 had with Petition,and aggressive,erratic behavior by Jones) such that
20 at least one juror may have entertained a reasonable doubt whether
21 an intentional killing was committed with sufficient deliberation and
22 premeditation to elevate it to first degree murder,thereby demonstra-
23 ing prejudice
24

25 Also,Petitioner suffers from 'schizphrenia',a severe mental
26 illness. (RT 1:121 [Confidential Marsden hearing]. Mental health
27 diversion was not requested. At the time of trial,the pretrial di-
28 version statue had been amended to preclude diversion for a defendant

1 charged with murder. The issue whether Petitioner in this position
2 was none the less entitled to diversion is pending review. The judge-
3 ment should be conditionally reversed and the case remanded to permit
4 the trial court to consider whether to grant Petitioner mental health
5 diversion pursuant to Penal Code section 1001.36 (Post, §2.).

6 The record is replete with evidence that if Petitioner committed
7 the shooting, then his action were grounded in considerable subjective
8 provocation. Although Petitioner denied involvement in the shooting,
9 the videotaped interrogation reveals what the police interviewers
10 stated was an admission that Petitioner killed Jones in the heat of
11 passion. (CT Aug. 1:86 [You told us about how it was just a heat-of-
12 the moment thing]. The police interrogators characterization of
13 Petitioner's statements as an admission that he killed Jones in the
14 heat of passion was a fair characterization given his answer to their
15 questions. Petitioner stated Jones admitted to having an affair the
16 previous night with a man who paid her approximately \$300, he admitted
17 that Jones had accused him of infidelity, he admitted that Jones was
18 very aggressive, and in connection with circumstances of the killing
19 he stated that he was 'sure it was a spur of the moment'. It wasn't
20 something that was contemplated or thought about or intentionally
21 done with hateful feelings. (CT, Aug. 1:46).

22 Defense counsel requested an instruction on voluntary manslaughter
23 based on heat of passion and provocation (CALCRIM NO. 570). citing,
24 circumstantial evidence of an altercation at the scene of the homi-
25 cide and Jones's history of aggressive behavior. (RT 4:1019-1094).
26 The instruction would have required findings on both objective com-
27 ponents (reasonable person) and a subjective component (subjective
28

1 provocation).People v. Moye (2009) 47 Cal.4th 537,549-550). The
2 instruction was refused as the trial court found 'Insufficient evidence
3 nce of provocation' (RT 4:1123).

4 Defense counsel should then have moved for instruction with
5 [CALCRIM NO. 522];stating;in pertinabt part:'Provocation may reduce
6 a murder from first degree to second degree...the weight and significance
7 of the provocation,if any,are for you to decide. If you conclude that the defendant committed murder but was provoked,consider
8 the provocation in deciding whether the crime was first or second
9 degree murder....',arguing that if there was insufficient evidence o
10 objective provocation,then the evidence of subjective provocation
11 warranted instruction that subjective provocation alone could raise
12 a reasonable doubt as to the existence of premeditation and deliberation
13 sufficient to reduce premeditated first degree murder to second
14 degree murder. This would have been an easier argument than the one
15 counsel made on voluntary manslaughter because it only required
16 sufficient evidence of subjective provocation and the court was already
17 going to instruct on second degree murder.

18 Having lost the argument for an instruction on the lesser included
19 offense of voluntary manslaughter,there could be no valid
20 strategic reason for counsel not to use a subset of that argument
21 (subjective provocation) for an instruction reducing first degree
22 murder to second degree murder [CALCRIM NO. 522]. The record shows
23 that counsel's strategy included seeking conviction for a lesser
24 offense than first degree murder based on provocation (including
25 subjective provocation).The record thus demonstrates deficient performance
26 in failing to request an instruction in the language of
27 [CALCRIM NO. 522](Post.§1.B(3)).
28

1 The record also supports a finding of a 'reasonable probability
2 of a more favorable result. The jury only given two options if it
3 were to return a guilty verdict;second degree murder and first degree
4 murder. In view of the prosecution's case on the issue of identity
5 (ante,§A statement of facts,the prosecution's case). The material
6 issue for the jury to resolve was premeditation and deliberation. The
7 record discloses substantial evidence of subjective provocation as
8 shown by,among other things, 'Jones's admission to Petitioner hours
9 before the killing that she had an affair the previous night with a
10 man who paid her \$300. This evidence,and other evidence presented
11 through the videotaped interrogation,supports a killing grounded in
12 subjective provocation. Even an express-malice,intentional killing
13 is second degree murder. To elevate the killing to first degree murder
14 there must exist substantial additional proof,i.e. proof that the
15 killing was committed with premeditation and deliberation. If the
16 jury instruction on subjective provocation reducing first degree
17 murder to second degree murder were given,only one juror had to
18 entertain a reasonable doubt on the issue in order for the jury to
19 be hung on the verdict of first degree murder. This record demon-
20 strates a reasonable probability of such a result,especially since
21 the jury requested to view the videotaped interrogation during the
22 deliberation. (Post,§1.B(4)).

23 Trial defense counsel's circumstantial-evidence based argument
24 omitted a request for CALCRIM NO. 522,and it entirely overlooked the
25 direct evidence of subjective provocation presented in Petitioner's
26 videotaped interrogation admitted into evidence during the prosecution's
27 case. The police characterized the videotaped interrogation as a
28 confession to killing Jones in the heat -of-passion. (CT AUG. 1:46.86

[You told us about how it was just a heat-of-the-moment thing'.].

Under both the 6th Amendment to the federal constitution and Cal.Const.art.I,§15,a criminal defendant has a right to the effective assistance counsel. (Strickland v. Washington (1984) 466 U.S. 663,684 -685;People v. Pope (1979) 23 Cal.3d. 412,422). The ultimate purpose of this right is to protect the defendant's fundamental right to a fair trial in it's conduct and reliable in it's result. To comply with constitutional standards counsel must perform as would a reasonably competent attorney 'acting as his diligent conscientious advocat UNited Sates v. DeCoster (D.C. Cir.1973) 487 F.2d. 1197,1202;accord. People v. Pope,supra,23 Cal.3d. at p.423).

Instruction in the language of CALCRIM NO.522 was supported by the evidence and consistent with the defense case,thereby demonstrating the deficient performance prong.

California Supreme Court has long held that the existence of subjective provocation may 'raise a reasonable doubt that the defendant formed the intent to kill upon,and carried it out after,deliberation and premeditation.' People v. Valentine (1946) 28 Cal. 2d. 121,132;People v. Rivera (2019) 7 Cal. 5th 306,at p.328;CALCRIM NO. 522).

The jury was instructed on murder,that murder requires malice, and that if the jury decided Petitioner comitted murder,it was second degree murder,that he carefully weighed the consideration for and against his choice and, knowing the consequences,decided to kill;that premeditation means a decision to kill before commission of the act that caused death;and a 'decision to kill,made rashly,impulsively or without careful consideration is not deliberate and premeditated. (CT 3:585;CALCRIM NO. 521). The trial court did not instruct on pro-

1 vocation and there was no mention of provocation and/or heat of passion
2 CALCRIM NO. 522, quoted above but restated here for ease of re-
3 ference, states, in pertinent part;

4 Provocation may reduce a murder from first degree
5 to second degree... The weight and significance of
6 the provocation, if any, are for you to decide.

7 If you conclude that the defendant committed
8 murder but was provoked, consider the provocation
9 in deciding whether the crime was first or second
10 degree murder...

11 Instruction in the language of CALCRIM NO. 522, is based on the
12 principle that 'provocation which is not 'adequate' to reduce the
13 class of the offense [from murder to manslaughter] may nevertheless
14 raise a reasonable doubt that the defendant formed the intent to kill
15 upon, and carried it out after deliberation and premeditation. People
16 v. Wickersham (1982) 32 Cal.3d. 307, 329, overruled on another ground
17 in People v. Barton (1995) 12 Cal. 4th 186, 200-2001). If the provocat
18 would not cause an average person to experience deadly passion but it
19 precludes the defendant from subjectively deliberating or premedi-
20 tating, the crime is second degree murder. People v. Hernandez (2010)
21 183 Cal. App. 4th 1327, 1332:..

22 In Petitioner's case, defense counsel failed to request such an
23 instruction (and there was no discussion thereof) rendering ineffect-
24 ive assistance of counsel because there was direct evidence of sub-
25 jective provocation, which combined with the circumstantial evidence
26 cited by counsel, fully supported instruction in the language of
27 CALCRIM NO. 522 [Provocation; Effect on degree of murder]. The instruc-
28 tion also was consistent with the defense's theory of the case as
shown by counsel's request for instruction on voluntary manslaughter
(also requiring subjective provocation) and his closing argument wher
he told the jury that the killing was committed rashly and impulsively

(RT 4:1169).

1 Defense counsel's representation fell below an objective standar
2 of reasonableness. The record discloses no reasonable tactical expla-
3 nation for counsel's failure to request that the jury be instructed i
4 the language of CALCRIM NO. 522. Such an instruction requires only a
5 finding of subjective provocation to negate premeditation and deli-
6 beration and reduce the offense to second degree murder. People v.
7 Rivera, supra, 7 Cal. 5th at p. 328). In contrast, the provocation
8 necessary to reduce any murder to voluntary manslaughter requires mor
9 'For that, an objective test...applies;' the provocation must be so
10 great that, in the words of CALCRIM NO. 570, it would have caused a per
11 son of average disposition to act rashly and without due deliberation, tha
12 is, from passion rather than from judgement.' People v. Jones (2014)
13 223 Cal. App. 4th 995, 100-1001) .

14
15 A defendant is entitled to have the jury given specific instruc-
16 tions pin pointing the theory of the defense. People v. Mayo (1961)
17 194 Cal. App. 2d. 527, 536-537). Although defense counsel did not
18 concede the issue of identity, during closing argument, he presented th
19 alternate theory of second degree murder based on a killing committed
20 rashly and impulsively (RT 4:1169), Instruction in the language of
21 CALCRIM NO. 522, would have been proven beyond a reasonable doubt. IT
22 also would have added the additional element of subjective provocatio
23 into the analysis, which counsel sought to introduce to the jury in
24 connection with the voluntary manslaughter instruction. There thus
25 could be no tactical reason for failing to request instruction with
26 CALCRIM NO. 522.

27 The test for sufficiency of proof is a favorable one, requiring
28 instruction where there is any evidence deserving of consideration

1 irrespective of any credibility findings. People v. Breverman (1993
2 19 Cal. 4th 142,162-163;People v. Lewis (2001) 25 Cal. 4th 610,646)

3 A reasonable probability exists of a more
4 favorable result based on evidence of sub-
5 jective provocation (i.e. recent admission
6 of infidelity by Jones in the romantic re-
7 lationship she had with Petitioner and the
8 aggressive, erratic behavior by Jones) such
9 that at least one juror may have entertained
a reasonable doubt whether an intentional
was committed with sufficient deliberation
and premeditation to elevate it to first
degree murder, thereby demonstrating the
prejudice prong.

10 An error made by defense counsel will require reversal when
11 'there is a reasonable probability that, but for counsel's unpro-
12 fessional errors, the result of the proceeding would have been
13 different'. Strickland v. Washington, supra, 466 U.S. at p. 694', this
14 test is not outcome-determinative and does not require the defendant
15 to show "that counsel's deficient conduct more likely than not
16 altered the outcome in the case". (id. at p. 694). Although the
17 Strickland standard was not intended to be a precise one, 'In stati-
18 stical terms, we believe Strickland requires a significant but some-
19 thing-less-than-50 per cent likelihood of a more favorable verdict.
20 People v. Howard (1987) 190 Cal. App. 3d. 41,48; see also, Williams v
21 Taylor (2000) 529 U.S. 362 [Strickland standard is satisfied by a
22 showing of proof which is less than a preponderance of the evidence

23 There is a reasonable probability that the result would have b
24 een more favorable to Petitioner absent counsel's omission. First,
25 there was strong evidence of subjective provocation, which included
26 recent allegations of infidelity and aggressive behavior by Jones
27 (Ante, §1.8(3)).

28 Second, none of the instructions in this case (including the
instructions on premeditation and deliberations) made reference to

1 the concept of provocation and/or heat of passion. (CT.3:560-606);
2 compare People v. Berry (1976) 18 Cal.3d. 509,518), 'reversing first
3 degree murder conviction for failure to instruct on voluntary man-
4 slaughter even through the instructions made "reference to heat o
5 passion and provocation for the purpose of distinguishing between
6 murder of the first and second degrees".

7 **Third,** Substantially more evidence is necessary to elevate ev
8 an intentional killing from second to first degree premeditated
9 murder. People v. Jennings (2010) 50 Cal. 4th 616,645 [premeditati
10 requires consideration beforehand,deliberation means formed or
11 arrived at as a result of careful thought and weighing of consider
12 ation for and against a proposed course of action]. People v. Hal-
13 vorsen (2007) 42 Cal. 379,419). By cojoining the words willful,del
14 liberation and premeditated in section 189 in it's definition and
15 limitation of the character of killings which constitute first
16 degree murder,the legislature emphasized it's intention to require
17 as an element of this offense substantially more reflection than may
18 be involved in the mere information of specific intent to kill.
19 People v. Arias (2008) 45 Cal.4th 169,131;People v. Thomas (1945) 25
20 Cal.2d. 880-890). The legislature's classification of murder into
21 two degrees thus would be meaningless if 'deliberation' and 'pre-
22 meditation' were construed as requiring no more reflection than may
23 be involved in the mere formation of a specific intent to kill.
24 People v. Wolff (1964) 61 Cal.2d. 795,821).

25 **Fourth,**In view of the evidence in the issue of identity,the
26 real material issue for the jury's consideration was whether the
27 killing was deliberate and premeditated. During deliberation ,the
28 jury requested to view Petitioner's videotaped interrogation. (CT 3

1 :548;Ct Aug.1:148;RT 5:1184-1185),where there is evidence of sub-
2 jective provocation and the jury asked,'can we please have a simpler
3 definition of premeditation?'...[in response to the request for
4 clarification and by agreement of the parties,the jury was referred
5 back to "Jury Instruction No. 521";(RT 5:1188:Ct Aug. 1:144:CT 3: 586
6 'These are matters demonstrating the closeness of the case on
7 the issue of premeditation and deliberation. People v. Beach (1991)
8 229 Cal. App.3d. 1282,1295),'requests for readback of testimony and
9 jury instructions are indications the deliberations were close'. It
10 also demonstrates a reasonable possibility that had counsel requested
11 CALCRIM NO.522 and been able to argue the evidence cited herein,at
12 least one juror would have entertained a reasonable doubt on the
13 first degree murder. People v. Soojian (2010) 190 Cal. App.4th 491,
14 520,'hung jury more favorable result' see also, Cone v. Bell (2009)
15 556 U.S. 449,452;'issue is whether there is a "reasonable probability
16 that the withheld evidence would have altered at least one juror's
17 assessment'.

18 Trial defense counsel argued against finding of premeditation
19 and dleiberation. Counsel highlighted the prosecution's burden of
20 proof on the issue,and argued that there hasn't been any evidence of
21 any sort of deliberation by the Petitioner. (RT 5:1166).

22 Counsel argued;

23To be deliberate is basically the job that
24 you have to do after we are done talking. That is to consider your
25 actions,consider your next step,consider the ramifications of your
actions and still take action or decide not to take that action.

26 There hasn't been any evidence of any sort of deliberation by
the defendant. All we have heard is circumstantial evidence placing
27 the gun at the same location with the defednant and with Felicia,
There hasn't been any text message,there hasn't been a witness....
28 without any evidence of deliberation you can't have deliberation
beyond a reasonable doubt. Therefore,you cannot convict him of first
degree murder. (RT 5:1166-1167).

1 Now in regard to the location, it's not as remote as you would
2 be led to believe. Clearly, it's close to the bridge, it's right off
3 the freeway, it's common it seems to be a common exit, being close to
4 a freeway, is simply not the sort of place that someone would go to
5 in order to execute someone and get rid of the remains.

6 Felicia was found in the middle of the road, the fact that she
7 was run over actually indicates that the person that did shoot her
8 was being hasty and was scared and was trying to get away and was not
9 expecting for this to happen. (RT 5:1157-1168).

10 Now, in the rules that the judge has read to you, you also see that
11 a decision to kill made rashly, impulsively or without careful con-
12 sideration is not deliberate and premeditated. Everything we have just
13 covered right now suggests that this was a rash incident, not planned
14 not premeditated and the actions of someone that was confused, scared
15 and simply didn't know what to do. (RT 5:1169).

16 The prosecution's evidence of deliberate and premeditated killing
17 did not remove the possibility that the jury would find the evidence
18 lacking, especially on proof beyond a reasonable doubt, and an instruc-
19 tion on subjective provocation could easily have tipped the scale of
20 proof beyond a reasonable doubt in Petitioner's favor. see, Yates v.
21 Eyatt (1991) 500 U.S. 391, 403-404; 'an instructional error may be found
22 to be harmless where it is shown beyond a reasonable doubt that the
23 error was 'unimportant in relation to everything else the jury con-
24 sidered on the issue in question, as revealed in the record.' When a
25 case is close, a small degree of error in the lower court should, on
26 appeal, be considered enough to have influenced the jury to wrongfully
27 convict the appellant. People v. Wagner (1975) 13 Cal.3d 612, 621;
28 People v. Collins (1968) 68 Cal.2d. 319, 332).

1 If the jury had been instructed that it could consider subjective
2 provocation in evaluating whether Petitioner acted with premeditation
3 and deliberation, the evidence could well have persuaded the jury to
4 find that shooting was grounded in Petitioner's subjective provocation
5 in learning Jones had been unfaithful in their relationship-resulting
6 in Petitioner having committed not a first degree murder but a second
7 degree murder.

8 The high court has observed that the 'discharge of the jury's
9 responsibility for drawing appropriate conclusions from the testimony
10 depends on discharge of the judge's responsibility to give the jury
11 the required guidance by a lucid statement of the relevant legal
12 criteria'.. 'Bollenbach v. United States (1946) 326 U.S. 607, 612,
13 involving a court's erroneous charge to the jury in answer to a jury's

1 in answer to a jury's question.

2 Nor is the outcome to be left to the discerning eye of the
3 reviewing court. 'In view of the place of importance that trial jury
4 has in our Bill of Rights, it is not to be supposed that Congress
5 intended to substitute the belief of appellate judge's in the guilt
6 of an accused, however, justifiably engendered by the dead record, for
7 ascertainment of guilt by a jury under appropriate judicial guidance
8 however cumbersome that process may be.' (Id. at p. 615).

9 A jury...is not an unguided missile free according
10 to its own muse to do as it pleases. To accomplish
11 its constitutionally mandated purpose, a jury must
12 must be properly instructed as to the relevant law
and as to the relevant law and as to its function
in the fact-finding process, and it must assiduously
follow these instructions.

13 (McDowell v. Calderon (9th Cir. 1997) 130 F.3d. 333,835)

14 There was substantial evidence from which the jury could have
15 inferred that Petitioner acted under subjective provocation sufficient
16 to negate premeditation and deliberation and thereby reduce first
17 degree murder to second degree murder. If the jury had been instructed
18 that it could consider Petitioner's subjective provocation in
19 evaluating whether Petitioner acted with premeditation and deliberation
20 then the evidence could well have persuaded the jury that subjective
21 provocation resulted in Petitioner having committed not first degree
22 murder but second degree murder. The error cannot be declared harmless
23 beyond a reasonable doubt.

24 The Judgement of conviction of premeditated murder should be
25 reversed for prejudicial ineffective assistance of counsel.

26 2. The judgement should be conditionally reversed
27 and the case remanded to permit the trial court
28 to consider whether to grant Petitioner mental
health diversion

1 Penal Code section 1001.36 went into effect on June 27, 2018
 2 (Stats. 2018, ca. 34, §24, eff. June 2018 (A.B.1810)). The new provide
 3 trial courts courts with the discretion to grant 'pretrial diversion
 4 for the purpose of mental health treatment for up to two years, if
 5 it finds the defendant has a mental disorder that was a significant
 6 factor in the commission of the charged offense'. see, People v.
 7 McShane (2019) 36 Cal. App. 5th 245, 259, review granted Sept. 18, 20
 8 S257013). The statute requires the court to dismiss the criminal
 9 charges if the defendant performs satisfactorily in diversion.
 10 (Pen. Code §1001.36, subd. (e), effective January 1, 2019, the legislature
 11 amended the statute to preclude diversion for the defendant's charge
 12 with certain serious offenses including murder. (Stats. 2018, ca. ch.
 13 1005, §1, eff. Jan. 1, 2018 (S.B. 215)).

14 Section 1001.36 applies retroactively to cases in which the
 15 judgement is not yet final. People v. Frahs (2020) 9 Cal. 5th 618,
 16 624).

17 Petitioner recognizes that in McShane the court addressed the
 18 same contention raised here. People v. McShane, supra 36 Cal. App.
 19 5th at p. 245, review granted). McShane argued he was entitled to
 20 the retroactive benefit of the 2018 diversion law, but that the
 21 2019 amendment excluding those charged with murder did not
 22 apply to him. (id. at pp. 260-261). The fact that the defendant was
 23 briefly eligible for pretrial diversion under the statute, as
 24 originally enacted, was irrelevant to the retroactivity analysis.
 25 (Id. at p. 260).

26 Whether section 1001.36 is retroactive as originally enacted
 27 but not amended, is under review by the Supreme Court. People v.
 28 McShane, supra 36 Cal. App. 5th at pp. 260-261, review granted:

1 People v. Cawkell (2019) 34 Cal. App. 5th 1043,1053,review grante
2 Aug. 14,2019.S256113).

3 Applying section 1001.36 retroactively to Petitioner as ori-
4 ginally enacted is compelled by due process because under state law
5 it is then applicable to him. People v. Frahs,supra,9 Cal. 5th 618;
6 see. In re Estrada (1965) 65 Cal.2d. 740,745;People v. Superior
7 Court (Lara)(2013) 4 Cal. 5th 299,307,and disparate application of
8 state law denies federal due process. Hicks v. Oklahoma (1980) 447
9 U.S. 343,346,[arbitrary deprivation of a state-created liberty
10 interest violates due process;Hewitt v. Helms (1983) 459 U.S. 460,
11 466 [liberty interests protected by due process clause arise from
12 two sources,the due process clause itself and the laws of the states
13 U.S. Const. 5thand 14th Amends.).

14 Moreover,if section 1001.36 as currently written were applied
15 to Petitioner,then it would impermissibly increase his punishment by
16 eliminating the opportunity to diverison that existed when the statu~~E~~
17 was first enacted and applicable to Petitioner ,thereby violating ex
18 post facto clauses of the federal and state constitutions.(U.S. COns
19 14th Amendment;Cal. Const. art.I,§§9,10).

20 In Frahs,our California Supreme Court held that 'a conditional
21 limited remand for the trial court to conduct a mental health diveris~~on~~
22 sion eligibility hearing is warranted when...the record affirmativel
23 discloses that the defendant appears to meet at least the first
24 threshold eligibility requirement for mental health diverision-the
25 defendant suffers from a qualifying mental disroder (§1001.23 Subd.
26 (b)(1)(A)0;(People v. Frahs,supra,9 Cal. 5th at p.640). In so holdi~~ng~~
27 the Frahs court acknowledged that 'When,as here,"a defendant was
28 tried and convicted before section 1001.36,became effective,the

1 record on appeal is unlikely to include information pertaining to
 2 to several eligibility factors, such as whether the defendant consen
 3 to diversion (§1001.36, subd. (B)(1)(D)).. agrees to comply with
 4 treatment as a condition of diversion (id., subd. (b)(1)(E)), or has
 5 provided the opinion of a qualified mental health expert that the d
 6 defendant's symptoms would respond to mental health treatment. (id.
 7 subd. (b)(1)(C)). (Frahs at p.538).

8 Here, 'the record affirmatively discloses' that Petitioner
 9 'appears to meet at least the first threshold eligibility requireme
 10 for mental health diversion' he suffers from a qualifying mental
 11 order. see, People v. Frahs, supra 9 Cal. 5th at p. 640). Before tria
 12 the court heard several Marden motions, during which it was disclose
 13 that Petitioner suffered from "Schizophrenia. (RT 1:121) [confidenti
 14 Marden hearing]]. Schizophrenia is a qualifying mental disorder for
 15 pretrial diversion pursuant to section 1001.36 subd. (b)(1)(A).

16 The judgement should be conditionally reversed and the case
 17 remanded to permit the trial court to consider whether to grant
 18 Petitioner mental health diversion.

19 CONCLUSION

20 For the foregoing reasons, the judgement of first degree murde
 21 should be reversed for ineffective assistance of counsel for failur
 22 to request such an instruction that subjective provocation could
 23 raise a reasonable doubt as to the existence of premeditation and
 24 deliberation sufficient to reduce premeditated first degree murder
 25 to second murder. The judgement should be conditionally reversed a
 26 the case remanded to permit the trial court to consider whether to
 27 grant Petitioner mental health diversion.
 28

1 Dated; _____,
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4 Respectfully Submitted,
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- (2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No
(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No
(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

c. Ground three: _____

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- (2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☒ No
(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No
(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

d. Ground four: _____

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- (2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☒ No
(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No
(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

e. Ground five: _____

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- (2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☒ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes x ☒ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes x ☒ No

9. If any of the grounds listed in paragraph 8 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: _____

//////////

10. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?

☐ Yes x ☒ No

If so, give the following information for each such petition (use additional pages, if necessary, and attach copies of the petitions and the rulings on the petitions if available):

a. (1) Name of court: _____

//////////

(2) Case number: _____

(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): _____

(4) Grounds raised (list each):

(a) _____

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(b) _____

(c) _____

(d) _____

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(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

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(7) Was an evidentiary hearing held? ☐ Yes ☒ No

b. (1) Name of court: _____

//////////

(2) Case number: _____

(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): _____

(4) Grounds raised (list each):

(a) _____

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(b) _____

(c) _____

(d) _____

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(e) _____

(f) _____

(5) Date of decision: _____

//////////

(f) 

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Page 8 of 11

Maurice Diandra Rozas

Petitioner

Jeff Lynch

Respondent(s)

**ELECTION REGARDING
CONSENT TO PROCEED BEFORE
A UNITED STATES MAGISTRATE JUDGE**

- A magistrate judge is available under 28 U.S.C. § 636(c) to conduct all proceedings in this case, including dispositive matters and entry of final judgment. However, a magistrate judge may be assigned to rule on dispositive matters only if all parties voluntarily consent.
- Parties are free to withhold consent to magistrate judge jurisdiction without adverse substantive consequences.
- If both parties consent to have a magistrate judge decide the case, any appeal would be made directly to the Ninth Circuit Court of Appeals, as if a district judge had decided the matter.
- Unless both parties consent to have a magistrate judge decide the case, the assigned magistrate judge will continue to decide only non-dispositive matters, and will issue a Report and Recommendation to the district judge as to all dispositive matters.

Please check the "yes" or "no" box regarding your decision to consent to a United States Magistrate Judge and sign below.

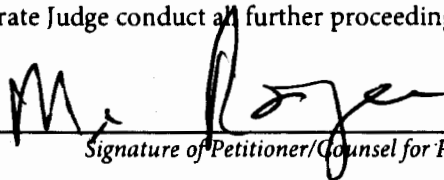
☐ Yes, I voluntarily consent to have a United States Magistrate Judge conduct all further proceedings in this case, decide all dispositive and non-dispositive matters, and order the entry of final judgment.

☒ No, I do not consent to have a United States Magistrate Judge conduct all further proceedings in this case.

Executed on

1-24-23

Date



Signature of Petitioner/Counsel for Petitioner

PROOF OF SERVICE

(C.C.P. §§1013(a); 2015.5; 28 U.S.C. §1746)

I, Marcia Rodzeds, am over the age of eighteen (18) years,
and I (am) (am not) a party to the within cause of action. My address is:

RJ4513
P.O. Box 240055
Repreza, Calif.
95671

On, Jan. 24, 23, I served the following documents:

MOTION AND DECLARATION FOR APPLICATION OF
COUNSEL

on the below named individual(s) by depositing true and correct copies thereof in
the United State mail in Represa, California, with postage fully prepaid thereon,
addressed as follows:

<u>1. U.S. Dist. Court Eastern</u>	<u>2. Office of Attorney General</u>
<u>District</u>	<u>1300 I St.</u>
<u>501 I St. Rm. 4-200</u>	<u>Sacramento, Calif.</u>
<u>Sacramento, Calif.</u>	<u>95834</u>
<u>95814</u>	

I have read the above statements and declare under the penalty of perjury of
the laws of the State of California that the foregoing is true and correct.

Executed this Jan day of 24, 2023, at California State
Prison - Sacramento, Represa, California.

(Signature)

Mr. Roger